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In the United States Circuit Court of Appeals for the Ninth District

E. C. BOWES and N. ANDREWS, Co-partners doing business under the firm name and style of BOWES & ANDREWS, Claimants of the Steamship "HOQUIAM," her engines, tackle, apparel and furniture,

Appellants,

vs.

W. M. BAUMERT,

Appellee.

No. 3155

BRIEF OF APPELLEE

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LEO TEATS,
RALPH TEATS,
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STATEMENT

It is conceded by the appellant that appellee was injured through the carelessness of the hatch-tender, who was the Second Officer of the ship. It is further conceded that the Second Officer was in command of appellee and others. It is also conceded that appellee was employed by the ship and working in its service; that he was paid by the

ship. The evidence shows that appellee and other longshoremen, together with the regular crew of the ship, were stowing away ties in her hold. That all of the men in the hold were working under the direction of the Second Officer, who was acting as hatch-tender.

Apostles 63-127-152.

ARGUMENT

The only question on appeal is whether or not Section 20, the Act of March 4th, 1915, applies in the case at bar.

The Section is as follows:

> "That in any suit to recover damages for any injury, sustained on board a vessel, or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

Quoting from *Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 61,

34 Sup. Crt. Rep. 735,

58 Law Ed. 1208,

51 LRA NS 1157,

the Court, in discussing the work of longshoremen, stated as follows:

> "The libelant was injured on a ship lying in navigable waters and while he was engaged in the performance of a maritime service. We entertain no doubt that the service of loading and stowing a ship's cargo is of

> this character. Upon its performance depends in large measure the safe carrying of the cargo and the safety of the ship itself, and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew, but, owing to the exigencies of increasing commerce, and the demand for rapidity and special skill, it has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners."

In the case at bar the regular crew of the ship were intermingled with and doing the same work as the longshoremen, under the same officer in command, to-wit: the Second Mate, and all in the ship's service.

If the law is to be construed as the appellant contends; that is, that a longshoreman is not protected by the Act and that his co-employee at the other end of the tie, a sailor, does come under the Act, when both men are in the service of the ship and under the same officer in charge, it certainly would be class legislation, which is prohibited by the Constitution. Constitutionality of the law is not attacked.

In the State of Washington we have a Workmen's Compensation Act; appellee must be protected either by the Act of Congress or by the Workmen's Compensation Act. Under the decision in the case of

Southern Pac. Co. vs Jensen, 244 U. S. 205,
37 Sup. Crt. Rep 521,
61 Law Ed. 1006, and

Clyde S. S. Co. vs. Walker, 244 U. S. 255,
37 Sup. Crt. Rep. 545,
61 Law Ed. 1116,

Doey vs. State Industrial Comm., 120 N. E. 53.

the State Industrial Insurance does not cover cases like the one at bar.

In the *Baron Napier*, 249 Fed. 126, Robert Lee signed as a muleteer on a ship being engaged in carrying mules to the Allies. His duties had only to do with the care of the mules and were not in any way connected with the navigation of the ship. He was ordered by the head-muleteer to stand a watch, to which he objected, having signed only as a muleteer. After threats by the head-muleteer, he consented to stand the watch, and while going to his station in the night time, he was injured by reason of the fact that he was not furnished a lantern. The Circuit Court of Appeals for the Fourth Circuit, through Mr. Prichard, Circuit Judge, said:

> "In this instance we think it is clearly established that Lee was injured while discharging a duty which he was required to perform by one who had the power to direct his movements. That he was injured cannot be doubted, when we consider all of the evidence. And that his injury was in all probability due to the fact that he was not furnished a lantern, by the use of which he could have observed any dangers incident to the duty he was performing. If, thus employed, he fell from any portion of the ship in consequence of not being

able to see his way and was injured, we think the finding of the court below that the ship was negligent, was proper. However, it is insisted by counsel for appellant that the liability of a vessel for injuries received by a seaman depends upon the unseaworthiness of a ship, or her failure to supply, or keep in order, proper appliances appertainent thereto. That the crew, except perhaps the master, are between themselves fellow-servants; that, therefore, the fellow-servant doctrine applies to such employee. In this instance the captain or the head-foreman should have furnished Lee with a lantern when they directed him to perform his duties incident to the work assigned to him, but this was not done.

"Section 20 of what is known as the Seamen's Act, enacted on the 4th day of March, 1915, abolishes what is known as the fellow-servant doctrine, by providing that in any suit to recover damages for an injury sustained on board a vessel, in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

In the above case the ship was held liable because the captain or head-foreman of the muleteers did not furnish Lee with a light, and certainly if Lee comes under the Act, so does Baumert in the case at bar. Why should Congress pass a law that would protect one man, carrying one end of a tie in the hold of a ship, and not protect the man carrying the other end of the tie?

We desire to quote from the opinion of Judge Cushman, who tried this case below.

Apostles 153, in speaking of the Act, says:

> "The language of the Act itself seems to be so studied, it would have been so simple to say that 'in any suit by any seaman' this should have been the rule, but unless it was intended to include something more than seamen, the language 'in any suit for injury'—that is the substance of it—that this rule should be applied. It would seem to me that it means something more than seamen. The use of the words 'a seaman in command,' followed by the word 'those,' without showing what, I think it means 'those injured,' instead of 'those seamen'; I think it refers back to the word 'injury' or 'injured'."

We have searched in vain for a judicial interpretation of this section of the statute, but from the cases above cited and the opinion of the trial judge, we submit that it was the intent of Congress to include men in the service of the ship, and, therefore, the case should be affirmed.

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